IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 14TH JUNE 2007 / 24TH JYAISHTA 1929

CRL.A.No. 1805 of 2006(A)

SC.353/2005 of ADDL. SESSIONS COURT (ADHOC), THRISSUR

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APPELLANT:

MOHAMMED KUNJU, CONVICT NO.2612,
CENTRAL PRISON, KANNUR.

BY ADV. ADV.G.G.MANOJ(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 7-6-2007 THE COURT ON 14/06/2007 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.Appeal No. 1805 of 2006

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Dated, this the 14th day of June 2007

JUDGMENT

In this Appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in S.C. 353 of 2005 on the file of the Addl. Sessions Court, Fast Track (Adhoc No.I) , Thrissur, challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 376 I.P.C.

THE PROSECUTION CASE

2. The case of the prosecution can be summarised as follows:-

On 31-8-2001 at about 2 p.m. inside the thatched hut situated in Kadappuram colony (sea side colony) to the west of Azheekode Puthenpalli in Azheekode village within the limits of Kodungallur Police Station 48 year old Muhammed Kunju with the intention of committing rape of 8 year old Faseela residing in the neighbouring house, got her into his kitchen under the pretext of asking her to fetch beedies for him and committed forcible sexual intercourse with the girl after removing her underwear. The accused has thereby committed the offence of rape

punishable under Sec. 376 I.P.C.

THE TRIAL

3. On the accused pleading not guilty to the charge framed against him by the court below for the aforementioned offence, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 7 witnesses as P.Ws 1 to 7 and got marked 7 documents as Exts.P1 to P7.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He further stated that the father of P.W.6 owed some amount to him and when he demanded the money back this case was falsely foisted against him.

5. Since the trial court did not consider this to be a fit case for recording an order of acquittal under Sec. 232 Cr.P.C., the accused was called upon to enter on his defence. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, found the appellant guilty of the offence punishable under Sec. 376 I.P.C.

and sentenced him to rigorous imprisonment for 7 years and to pay a fine of Rs. 5,000/- and on default to pay the fine, to suffer simple imprisonment for 6 months. The fine amount, as and when realised, was directed to be paid to P.W.6 the victim by way of compensation. It is the said judgment which is assailed in this Appeal.

7. I heard Adv. Sr. G.G. Manoj, the learned counsel who defended the appellant on State Brief and Adv. Sri.K.S.Sivakumar, the learned Public Prosecutor, who defended the State.

8. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:

THE PROSECUTION WITNESSES

P.W. 1 was the head constable at Kodungallur Police Station and he on 1-9-2001 recorded Ext.P1 F.I. statement of P.W.7 the mother of the victim and registered Ext.P1 (a) F.I.R. P.W.2 who was the Circle Inspector of Police, Mala verified the investigation conducted by P.W.3 who was his predecessor-in-office. P.W.3 who was the Circle Inspector of Police, Mala, conducted the investigation. He proved Ext.P2 scene mahazar pertaining to the

place of occurrence as shown to him by P.Ws.6 and 7. He arrested the accused on 1-9-2001 and got his potency test conducted. He recorded the statement of witnesses. Ext.P3 certificate of chemical analysis was marked through him. Similarly, Ext.P4 scene plan prepared by the Village Officer was also marked through him. P.W.4 was the civil surgeon in the Govt.Taluk Hospital, Kodungallur. She examined P.W.6, the victim, at 2 p.m. on 1-9-2001 and issued Ext.P5 wound certificate. Ext.P6, potency certificate issued by Dr. Sajith the Assistant Surgeon,Taluk Hospital, Kodungallur was also marked through P.W.4. P.W.5 who was a teacher at Hamadania U.P.School, Azheekode proved Ext.P7 certificate showing that P.W.6 was a student of the said school and that her date of birth was 15-5-1993. P.W.6 is the prosecutrix/victim. P.W.7 is the mother of P.W.6.

ARGUMENTS TO SUSTAIN THE CONVICTION AND SENTENCE

11. The learned Public Prosecutor made the following submissions before me in support of his argument to sustain the conviction as well as sentence:-

Merely because there was no injury in the private part of the victim and her hymen was found in tact and there was no

semen or spermatozoa in her vaginal swab, the prosecution case that there was sexual intercourse does not become suspect. The appellant was thus rightly convicted by the trial Court. Even if it could be said that the genital organ of the accused did not penetrate the vagina of the victim, there is evidence of ejaculation of semen between the thighs of the girl and this will at any rate amount to carnal intercourse within the meaning of Sec. 377 I.P.C. as interpreted by this Court in **State of Kerala v. Govindan Nair - ILR 1968 Kerala 605**. The punishment prescribed for the offence under Sec. 377 I.P.C. is also the same. It is true that there was no charge against the accused for an offence punishable under Sec. 377 I.P.C.. But, Section 464 Cr.P.C. will indicate that even the absence of a charge is not a ground sufficient enough to dislodge a conviction.

JUDICIAL EVALUATION

12. I am afraid that I cannot agree with the above submissions on behalf of the prosecution. The version given by P.W.6 before P.W.4 (Dr.Kunhumma Alex) at 2 p.m. on 1-9-2001 is as follows:

> "ഇന്നലെ ഉച്ചയ്ക്ക് ഊണ് കഴിഞ്ഞശേഷം അടുത്ത വീട്ടിലെ മുഹമ്മദ് എന്നയാൾ ബീഡിവാങ്ങിച്ചു തരാൻ

പറഞ്ഞ് എന്നെ വിളിച്ചിട്ട് അയാളുടെ വീടിനകത്ത് വച്ച് എന്റെ ഷഡ്ഡി ഊരിയിട്ട് അയാളുടെ മൊട്ട എടുത്ത് എന്റെമൂത്രം ഒഴിക്കുന്ന ഭാഗത്ത് കുത്തി കയറ്റി"

The clinical features noted by P.W.4 after examining the victim are as follows:

> ***General:*** *No injury seen*
>
> ***Genitalia:*** *Pubic hair absent. No injury seen over the external Genitalia. No discharge. Hymen is intact Swab taken from the posterior vaginal wall:*
>
> **Opinion:** based on the above facts I certify that
>
> *i) there is no evidence any sexual act*
> *ii) there is no evidence of signs of resistance*

13. P.W.6 was examined in court on 1-8-2005, that is, nearly four years after the occurrence. The substance of her deposition is as follows:-

Her house is at Kadappuram Colony in Azheekode village. The accused is residing in the house situated on the eastern side of her house. She is now studying in the 7th standard in Hamadania School at Azheecode. She was studying in the 3rd standard in the said school on the date of incident. The incident took place on 31-8-2001 at about 2 p.m. She was playing in the courtyard of her house. The accused called her

and asked her to buy beedies for him. Accordingly she went to the nearby shop and came back with the beedies. When she entered the kitchen the accused closed the door of the kitchen and suddenly removed her underwear. Thereafter the accused placed his genital on her private part and pressed it. (പ്രതിയുടെ മൂത്രം ഒഴിക്കുന്ന സാധനം എന്റെ മൂത്രം ഒഴിക്കുന്ന സ്ഥലത്ത് വച്ച് കുത്തി). She felt pain. When she began to scream,the accused held his hand against her mouth. At that time her mother (P.w.7) called her and she replied to the call from the kitchen of the accused. Her mother came and opened the door of the kitchen and saw the accused embracing P.W.6. The accused was at that time fully naked. After picking up her underwear from the floor she went along with her mother. She told her mother as to what happened. There was some white liquid smeared on her thighs. Next day she was examined by the doctor.

14. Even though P.W.6 had no case while giving evidence that the accused had inserted or thrust his genital organ into her vagina, her mother P.W.7 deposed that her daughter told her that the accused had thrust his genital organ into her private part. Going by the evidence of P.Ws 6 and 7 semen was found only on

the thighs. Ext.P3 certificate of analysis in respect of the vaginal swab taken by P.W.4, (the Doctor) from the posterior vaginal wall of P.W.6 shows that there was no semen or spermatozoa in the vaginal smear. The prosecution has no case that anybody else including the mother of the victim had seen the occurrence. Hence the only direct evidence regarding the occurrence is that of P.W.6, the victim. Her testimony is only to the effect that the accused placed his genital organ on her private part and pressed the same. She has no case that the accused had inserted his genital organ into her private part. If really there was penetration, then she would have said so in her evidence by employing the appropriate vernacular expression "കുത്തി കയറ്റി" which was used by her when she was examined by the doctor (P.W.4). Going by the Explanation to Sec. 375 I.P.C. penetration, however, slight is necessary to constitute the offence of rape.

15. Rape is the forcible and unlawful carnal knowledge of a woman by a man against her will. The word 'carnal' means pertaining to the flesh or bodily appetite. Going by the definition of "rape" as contained in Sec. 375 I.P.C. "sexual intercourse" between a man and a woman is an inevitable ingredient of the

offence. "Sexual intercourse" means heterosexual intercourse involving penetration of the vagina by the male penis. **(Vide Sakshi v. Union of India - 2004 (5) SCC 518).** Sexual intercourse necessarily involves copulative coupling or coition or coitus. But the Explanation to Sec. 375 I.P.C. makes it abundantly clear that in order to constitute sexual intercourse which is necessary for the offence of rape, penetration is sufficient. "To penetrate" means "to enter or pass through or force a way into or through". That is the reason why courts have taken the view that in order to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male genital organ into the vagina of a woman attended with emission of semen. Even vulval penetration with or without the emission of semen would be sufficient to constitute the offence. See **Mohammed v. State of Kerala - 1987 (2) KLT 565 and State of U.P. v. Babulnath - 1994 SCC Crl. 1585.** In **Sakshi's** case (supra) the Apex Court repelled the contention that sexual assault in the present days should not be restricted to forced genital copulation alone and that "sexual intercourse" as contained in Section 375 I.P.C. should receive a wider interpretation so as to include all forms of per - vaginal

penetration such as penile/vaginal, finger/vaginal, object/vaginal, penetrations and non - vaginal penetrations such as penile/oral, penile/anal and finger/anal penetrations. The Apex Court, accepting the long settled judicial opinion holding the field held that the expression "sexual intercourse" in Sec. 375 I.P.C. could only mean heterosexual intercourse involving penetration of the vagina by the male penis.

16. The trial judge was factually wrong in observing that the evidence of P.W.6 shows that the accused had inserted his penis into her vagina resulting in ejaculation of semen. As noted earlier P.W.6 has not said so. All that she spoke was that the accused pressed his genital organ against her private part and that there was some white liquid on her thighs. What persuaded the trial judge to conclude that there was sexual intercourse conforming to the requirements of Sec. 375 I.P.C. was the concluding portion of the following observation in para 8 of **Babulnath's case** (supra) **1994 SCC Crl. 1585** which reads as follows:

> "*Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or* ***even an attempt at penetration into the private part of the victim would be quite***

> ***enough for the purpose*** *of Sections 375 and 376 of I.P.C. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains*".
> *(emphasis supplied)*

With due respect, the above observation of the Apex Court to the effect that even an attempt at penetration into the private part of the victim would be enough for the purpose of Sections 375 and 376 of I.P.C. has been too widely stated and the same does not reflect the true legal position. In fact, the Apex court had occasion to consider a case which is almost identical to the facts of the present case. That case is **Madanlal v. State of Jammu and Kashmir - JT 1997 (7) SC 357.** In paragraph 9 of the above decision, the Supreme Court observed as follows:

> "*The High Court on reading the evidence of the prosecutrix has come to the finding that the prosecutrix's evidence was cogent and clear to the effect that there has been no penetration of the organ of the accused into the vagina of the prosecutrix and on the other hand the accused merely rubbed his genital organ as a result of which there was discharge of hot white liquid substance which fell on the thighs of the prosecutrix*"

Again in paragraph 11 of the said decision it is observed as follows:

> "*The Doctor who examined the prosecutrix on 23-5-1986 at 10. 30 a.m. stated that there was no*

> *mark of violence on any part of the body and on local examination there is no mark of violence on her private parts like vagina, the hymen was intact and on examination of vaginal smear no living or dead sperm was found on the slide and accordingly she opined that no definite opinion could be given regarding the attempt to sexual intercourse*"

After considering the evidence in that case, the Apex court concluded thus at page 369:

> "*It is thus apparent from the entire reading of the prosecutrix's evidence that the accused had rubbed his penis with vagina of the prosecutrix and tried to penetrate but could not succeed in penetrating and ultimately got himself discharged and the hot semen fell on the thighs of the prosecutrix*"

In paragraph 13 of the above decision repelling the contention of the accused that the above act would only constitute an offence punishable under Sec. 354 I.P.C. and not an attempt to commit rape punishable under Sec. 511 of 376 I.P.C., the Apex Court observed as follows:

> *“The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that the accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under*

> *Section 354 I.P.C. and not an attempt to commit rape under Section 376 read with 511 I.P.C. In the facts and circumstances of the present case the offence of an attempt to commit rape by accused has been clearly established and the High Court rightly convicted him under Section 376 read with 511 I.P.C"*

In the case on hand also the medical evidence clearly shows that there was no injury over the external genitalia of P.W.6, nor was there any discharge in her vagina and the hymen of the girl was found intact. The vaginal swab taken when subjected to chemical examination also did not reveal the presence of semen or spermatozoa. This medical evidence is consistent with the testimony of P.W.6. Hence, the conclusion reached by the trial Judge that the acts proved against the accused amounted to rape involving sexual intercourse and ejaculation of semen cannot be supported. The offence that was committed was really an attempt to commit rape punishable under Sec. 511 of Sec. 376 I.P.C.

16. The argument now advanced by the prosecution that even if there is no sexual intercourse involving penetration, it will definitely attract an offence punishable under Sec. 377 I.p.C. and that it is permissible to record a conviction under Sec. 377 I.P.C. even without a formal charge in that regard, is

misconceived. This is not a case of absence of charge. This is a case in which the accused was called upon to answer a specific charge of rape punishable under Sec. 376 I.P.C. Just because the prosecution evidence could not measure up to the legal requirements of "rape" as defined in Section 375 I.P.C., it is not open to this Court sitting in appeal, to convict the appellant for an offence punishable under Sec. 377 I.P.C. where "carnal intercourse against the order of nature" is the essence of the offence. The prosecution has no case that the accused had secured the presence of P.W.6 in his house for the purpose of satiating his lust through means against the order of nature.

17. The result of the foregoing discussion is that the conviction recorded by the Court below for the offence of rape punishable under Sec. 376 I.P.C. is unsustainable and the same is accordingly dislodged. Instead, the appellant is found guilty of the offence of attempt to commit rape punishable under Sec. 511 of Sec. 376 I.P.C. and is convicted thereunder.

18. What now survives for consideration is the question of sentence to be imposed on the appellant. He has been in custody since 1-9-2001. Having regard to the facts and circumstances of the case, the sentence imposed on the

appellant for the conviction under Section 376 I.P.C. is set aside and the imprisonment already undergone by the appellant will meet the ends of justice for his conviction under Section 511 of Section 376 I.P.C.

In the result, this Appeal is partly allowed. The appellant shall be released from prison forthwith unless his continued detention is found necessary in connection with any other case against him.

V. RAMKUMAR, (JUDGE)

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V. RAMKUMAR, J.

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Crl.Appeal No. 1805 of 2006

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Dated, this the 14th day of June 2007

JUDGMENT